BEFORE THE

WORLD TRADE ORGANIZATION

UNITED STATES – MEASURES TREATING EXPORT RESTRAINTS AS SUBSIDIES

WT/DS194

ANSWERS OF THE UNITED STATES OF AMERICA TO ADDITIONAL QUESTIONS FROM THE PANEL

2 March 2001

Questions to the United States

1. In paragraph 63 of the second oral statement of the United States, the United States objects to an approach which would "take together" the "measures" identified by Canada. Is it the US argument that the statute could be examined by the Panel without some regard to its interpretation as reflected in the SAA? Is it an accurate characterisation of Canada's argument that "'measures' that individually *do not* require an agency to do a particular thing . . . *do* so require when considered together"? It would appear that Canada's argument is, rather, that the "measures" they have identified do require, individually and collectively, the treatment of export restraints as financial contributions.

1. With respect to the first question, it is not the U.S. argument that the statute could or should be examined without some regard to the interpretation reflected in the SAA. *See, e.g.*, *Request by the United States for Preliminary Rulings* (12 December 2000), para. 124, note 134. In determining what U.S. law means, it would be appropriate for the Panel to consider the SAA, just as a U.S. court would, recognizing that the SAA can clarify, but not override, the statute. The statute at issue in this dispute, whether considered alone or in conjunction with the SAA, does not require action inconsistent with U.S. WTO obligations.

2. With respect to the second question, Canada nominally has made arguments in the alternative; *i.e.*, it has nominally argued that the measures should be looked at individually and as a package. However, the United States believes that the real focus of Canada's argument relates to considering the so-called "measures" together. For example, in *Canada's First Submission* (27 November 2000), para. 4, Canada states: "These measures, taken together, are inconsistent with Article 1.1 of the SCM Agreement ... ." In *Canada's Response to U.S. Request for Preliminary Rulings* ("*Canada's Response*") (11 January 2001), para. 8, Canada states: "Canada's Panel Request sets out four measures as constituting the relevant aspects of U.S. countervailing duty law that, when taken together, are inconsistent with the provisions of the SCM Agreement and the WTO Agreement identified by Canada." Similarly, in *Canada's First Oral Statement* (18 January 2001), para. 8, Canada states: "Since the beginning of this dispute Canada has been consistent in stating its concerns with the treatment of export restraints under U.S. countervailing duty law and that, for Canada, 'U.S. countervailing duty law,' in this context, means the U.S. measures taken together."

3. Finally, in *Canada's Responses to the Panel's January 18 Questions* (7 February 2001), Canada made the following statement in response to Question #4:

> Fundamentally, and from the outset of this dispute, Canada has challenged the treatment of export restraints under U.S. countervailing duty law. *This "treatment" is a result of the measures identified by Canada taken together.* In Canada's view this treatment is inconsistent with the United States' obligations under the SCM and WTO Agreements. *Thus, in Canada's view, these measures should be analysed together to determine the treatment of export restraints under U.S. countervailing duty law.* Canada has in its submissions described the role of each of these measures in setting out such treatment. Canada believes the measures should be analysed together. This does not mean that the measures taken

> separately are not susceptible to dispute settlement. In addition, should the Panel determine that one of the measures identified by Canada is not a "measure", this does not mean that the remaining measures are not susceptible to dispute settlement when considered together. (Emphasis added).

4. While Canada made a brief reference to the notion that "this does not mean that the measures taken separately are not susceptible to dispute settlement", the focus of Canada's arguments has not been on the "measures" taken individually. Indeed, it would be difficult for Canada to argue that the "measures" individually require action that would violate U.S. WTO obligations, given that Canada has admitted on numerous occasions that the statute, considered alone, is WTO-consistent, and given that, until it filed this case, Canada took a similar view with respect to the SAA. Likewise, in its 1995 comments regarding the DOC's rulemaking proceeding, Canada acknowledged that the DOC has preserved its "flexibility and discretion" by refraining from promulgating a regulation on the topic of "indirect subsidies."

5. The United States previously has demonstrated the significant problems with Canada's claim that the "measures" should be analyzed together, *Second U.S. Submission* (7 February 2001), para. 14, but it is worth summarizing them again. If, as Canada sometimes suggests, the "measures" individually require the DOC to treat export restraints as subsidies (or financial contributions), they do not need to be treated together, or as a "package", in order for Canada to obtain relief. However, knowing that it cannot demonstrate that any of the "measures" individually require the DOC to treat export restraints as subsidies (or financial contributions), Canada focuses on treating the "measures" together under the amorphous concept of something called an "administrative commitment." The problem with this argument, though, is that Canada has failed to cite any U.S. legal authority in support of the proposition that "measures" which individually are not mandatory somehow become mandatory when the "measures" are considered together. The reason for this, as previously explained by the United States, is that there is no such authority.

2. In respect of the criminal action provided for by the 1916 Act, the Appellate Body found that "the discretion enjoyed by the United States Department of Justice is not discretion of such a nature or of such breadth as to transform the 1916 Act into discretionary legislation . . . "[1]. Please comment on the implications, if any, of this finding of the Appellate Body for the order in which a panel might address the two questions of whether a particular legislation is mandatory or discretionary and of whether that legislation violates a Member's WTO obligations.

6. In the *1916 Act* case, the panel found that the legislation in question was mandatory legislation in the sense that, when applied, it required action inconsistent with U.S. WTO obligations. The panel also found, and the Appellate Body affirmed, that prosecutorial discretion to refrain from applying the statute was not enough to transform the 1916 Act into discretionary

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[1] *1916 Act*, Report of the Appellate Body, WT/DS136/AB/R-WT/DS162/AB/R, adopted 26 September 2000, para. 91 (footnote omitted).

legislation.

7. In the instant dispute, the issue is whether the so-called "measures" are mandatory legislation at all in the sense of requiring allegedly WTO-inconsistent action when applied. In the view of the United States, Canada has failed to establish that they are; *i.e.*, Canada has failed to establish that the "measures" require the DOC to treat export restraints as subsidies (or financial contributions).

8. With respect to the implications for this dispute, given that this dispute does not involve issues of prosecutorial or judicial discretion, and given that the applicability of the mandatory/discretionary doctrine is not in dispute, the only clear implication is that a statute must *require* a WTO breach in order to be found WTO-inconsistent as such.

9. In this regard, the United States calls to the Panel's attention the recently circulated panel report in *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, Report of the Panel circulated 28 February 2001 (unadopted). In rejecting a claim by Japan that the so-called "captive production" of the U.S. anti-dumping statute was inconsistent with U.S. WTO obligations, the panel stated, at para. 7.192, as follows:

> It is established GATT/WTO practice that the consistency of a law on its face may be challenged independently from any application thereof *only in so far as the law is mandatory and not discretionary in nature*. In other words, *only if a law mandates WTO inconsistent action or prohibits WTO consistent action* can the legislation be challenged on its face in a dispute settlement proceeding. (Emphasis added).

Referring to the analysis required by the captive production provision, the panel went on to add, at para. 7.197, that "[w]hile there is no guarantee that this analysis will result in a determination consistent with US obligations under the AD Agreement, it does not require any action inconsistent with those obligations."[2]

3. In *1916 Act*, the United States argued before the Appellate Body that the panel had incorrectly treated the mandatory/discretionary distinction as a defence by the United States, which the United States bore the burden of proving. The Appellate Body found no error by the panel in its articulation and application of the burden of proof.[3] Does the United States believe that the burden of proof questions are different in this case from those in *1916 Act*? In particular, does the fact that the United States has raised the

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[2] The panel reached a similar conclusion with respect to Japan's challenge to the critical circumstances provisions of the U.S. anti-dumping statute, citing the Appellate Body's decision in the *1916 Act* case for the continuing validity of the mandatory/discretionary doctrine. *Id.*, para. 7.141.

The panel also found it "of great importance" that the portion of the SAA relating to the "captive production" provision made clear that that provision did not require the relevant U.S. authority to ignore the requirements for a valid injury determination under the AD Agreement. *Id.*, para. 7.198. In a similar vein, the proviso to the SAA that we have been discussing in this case makes clear that the DOC must apply the standards of subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement.

[3] *Id.*, paras. 93-97.

mandatory/discretionary issue in the form of a request for preliminary ruling change the allocation of burden of proof in this case in any way? Please explain in detail, citing any relevant precedents.

10. As explained in the *U.S. Second Oral Statement* (21 February 2001), para. 9, in the *1916 Act* case the Appellate Body did not characterize the mandatory/discretionary doctrine as an "affirmative defense." Instead, the Appellate Body found that the panel had properly articulated and applied the rules on burden of proof as set forth in the *India Wool Shirts* and *EC Hormones* cases. The panel found that the EC and Japan had made a *prima facie* case that the 1916 Act was mandatory legislation that required WTO-inconsistent action when applied, and that the United States had failed to rebut their case.

11. With respect to the instant dispute, the United States does not believe that the burden of proof questions are different from those in the *1916 Act* case. Like the EC and Japan, Canada has the burden of proof, both in terms of making a *prima facie* case and bearing the ultimate burden of persuasion, that the "measures" constitute mandatory legislation that require the DOC to treat export restraints as subsidies when applied. The United States does not believe that Canada has made a *prima facie* case, but assuming *arguendo* that it has, the United States has successfully rebutted it.

12. With respect to the implications of the U.S. request for preliminary rulings, the United States does not see how such a request would affect the allocation of the burden of proof. In that request, the United States merely asked the Panel to dismiss Canada's case sooner rather than later because Canada had failed to demonstrate that the "measures" in question constitute mandatory legislation.

13. In this regard, the United States would note that the fact that the United States first raised the mandatory/discretionary doctrine in the context of its request for preliminary rulings does not limit the applicability of that doctrine. Under the mandatory/discretionary doctrine, in order to prevail, Canada must demonstrate that the "measures" require the DOC to treat export restraints as subsidies (or financial contributions). Canada would face this burden even if the United States had never requested preliminary rulings by the Panel.

4. The United States indicates, in its response to question 34 from the Panel:

> **"Obviously, the ordinary meaning of the 'entrusts or directs' standard requires *some causal connection* between the government action and the behaviour of private actors . . . " (emphasis added).**

According to the US approach outlined above, the existence of a financial contribution in the case of an export restraint would depend entirely on the reaction thereto of the producers of the restrained good, specifically, the extent to which they increase their domestic sales of the restrained product, and cannot be determined from the nature of that action (the export restraint) as such. Does this argument by the United States imply that the legal standard under subparagraph (iv) is broader than that under subparagraphs (i)-(iii), in the sense that (i)-(iii) have to do with specified actions by a

government, and not the results or effects thereof, while under subparagraph (iv) the US argument is that the results or effects are *determinative*? Or is the United States arguing that the effects would be relevant and determinative under all four paragraphs?

14. Whether it would be proper to characterize subparagraph (iv) as broader or narrower than the other subparagraphs is open to debate. It certainly can be said, however, that the standard under subparagraph (iv) is different from the standards under subparagraphs (i)-(iii). Under subparagraph (iv), for a financial contribution to exist there must be findings of: (a) government action that (b) entrusted or directed, (c) a private body, (d) to carry out a function of the type illustrated in subparagraphs (i) to (iii) that (e) is normally vested in the government and in no real sense differs from practices normally followed by governments.

15. The United States is not suggesting that an increase in the amount of goods provided domestically following the imposition of an export restraint, in and of itself, would be determinative of the issue of financial contribution. Rather, as previously explained by the United States,[4] at a minimum, a sufficient causal connection between the government action and the behavior of a private body would have to be shown.

5. If the *Lumber* and *Leather* cases were before the DOC today, would the DOC determine the existence of a financial contribution on the basis of factual evidence as to changes in the domestic supply of the restrained good? Would there (instead or also) be other analytical elements (beyond the existence of the export restraint as such), which the DOC would examine in making this determination? If so, please identify them.

16. Subject to the caveat that the United States is not in a position to state definitively what the DOC would do if the *Lumber* and *Leather* cases were before the DOC under the post-WTO CVD law, it is highly probable that the DOC would examine factual evidence relating to changes in domestic supply of the restrained good. Although this does not purport to be a definitive list, other types of evidence that the DOC might consider would be econometric analyses; the specific language of the export restraint measure in question; the existence and nature of any penalties for non-compliance; the purpose for which the export restraint was imposed; whether demand for the restrained product exists outside the jurisdiction in question; whether there are sufficient exports to meet that demand notwithstanding the existence of an export restraint; the extent of the price differential, if any, between the domestic and export markets; whether producers of the restrained product desired to export their products. More generally, the DOC would require evidence establishing that each of the elements of subparagraph (iv) is satisfied.

6. The United States submits, in response to question 36(b) from the Panel, that "the 'benefit' and 'specificity' elements will operate so as to render many alleged indirect subsidies non-actionable and, thus, non-countervailable". Please comment on the implications for this argument, if any, of the Appellate Body statement, in *Brazil – Aircraft*, that "the issues – and the respective definitions – of a 'financial contribution' and a

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[4] *See Answers of the United States to Questions from the Panel* ("*U.S. Answers*") (7 February 2001), paras. 132-133.

'benefit' are two separate legal elements in Article 1.1 of the SCM Agreement, which *together* determine whether a 'subsidy' exists"[5] for this US comment. In particular, is it correct that the US comment implies that the "financial contribution" element would not act as a limiting factor in itself in respect of the determination of the types of measures that fall within the scope of the SCM Agreement, and that the only limiting factors are "benefit" and "specificity"?

17. The United States does not dispute the notion that "financial contribution" and "benefit" are separate elements, *see, e.g., U.S. Answers*, para. 9, and the implication read into the U.S. response is incorrect. As is implicit in the U.S. answer to question 36(a), not all government measures would satisfy the standard of subparagraph (iv), so that "financial contribution" would be a limiting factor. *Id.*, para. 79. However, it also is the U.S. view, as set forth in *U.S. Answers*, para. 80, that it would be short-sighted to focus solely on the financial contribution element in analyzing Canada's "slippery slope" argument, because it is a fact that the elements of "benefit" and "specificity" will also serve to weed out government measures that might arguably satisfy the definition of "financial contribution." The second half of the Appellate Body's statement quoted above in fact confirms the United States' point: "financial contribution" and "benefit" together determine whether a "subsidy" exists.

18. Moreover, because "benefit" is also a requirement for finding a "subsidy," in certain instances the DOC may be relieved of undertaking a "financial contribution" analysis in determining that a particular government measure does *not* constitute a subsidy within the meaning of Article 1.1. Contrary to Canada's mischaracterizations of the case, this situation arose in *Live Cattle* where the DOC found there was no benefit, and consequently did not need to make a final determination with respect to the U.S. industry's claims concerning "financial contribution."

7. In respect of the circumstances in which a subsidy is, in the words of footnote 4 of the SCM Agreement, "tied to" actual or anticipated exportation, the Appellate Body, in *Canada – Aircraft*, found as follows:

> **"It does *not* suffice to demonstrate solely that a government granting a subsidy *anticipated* that exports would result. The prohibition . . . applies to subsidies that are *contingent* upon export performance . . . [A] subsidy may well be granted in the knowledge, or with the anticipation, that exports will result. Yet, that alone is not sufficient, because that alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation".[6]**

What implications, if any, would this Appellate Body statement have for the US argument that an export restraint can meet the SCM Agreement's definition of a financial

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[5] *Brazil – Export Financing Programme for Aircraft*, Report of the Appellate Body, WT/DS46/AB/R, adopted 20 August 1999, para. 157 (emphasis in original).

[6] *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, adopted 20 August 1999, paras. 171-172.

contribution if it has the *effect* of increasing the domestic supply of the restrained good?

19. In the view of the United States, the quoted statement has little relevance to the issues in this dispute, because the Appellate Body was addressing terms ("contingent" and "tied to") that have different meanings than the terms at issue in this case.

20. Having said that, to the extent that the Appellate Body's teachings were applied to this case by analogy, they support the U.S. position. The United States does not contend that mere anticipation or expectation of a result is sufficient to find a financial contribution under subparagraph (iv). Instead, there would, at a minimum, have to be a finding that an export restraint caused the provision of a good.

8. Is it the US position that a trader is "entrusted or directed" to provide goods (because it is "caused" to do so) where it is faced by an export restraint to which it could respond by any of several commercially viable options, one of which is to supply the domestic market, and it chooses that option? The Panel refers to paragraphs 47-48 on the one hand, and paragraph 125 on the other hand, of the US responses to questions dated 7 February 2001.

21. With respect to whether "entrusts or directs" means "cause", it is not the position of the United States that the mere fact that a producer chooses to supply goods domestically in the face of an export restraint means that it has been "directed" to do so within the meaning of subparagraph (iv). There would have to be some type of demonstrated causal connection between the producer's behavior and the government action, although the DOC has not yet had to address the question of how strong this causal connection would have to be. Also, while the standards may be different for "entrusts" and "directs", the United States reiterates that every dictionary cited in this dispute by either party contains a definition of "direct" with causal elements.

22. With respect to the issue of alleged "options", none of the options presented by Canada are "commercially viable" in this context. Canada posits a producer having essentially four options: export, sell to domestic processors, process itself, or go out of business. If it is proven, on the facts of the case, that export has been legally/commercially restricted and, in fact, selling to domestic processors is the only commercially viable option and such sales increase, this result would not seem to warrant a different characterization for purposes of the SCM Agreement than if the government had simply declared "you must sell only to domestic processors." In the view of the United States, where a government action leaves only one commercially viable option to private entities, to say that the government action does not "direct" a commercial actor to exercise that option would open an enormous loophole in the SCM Agreement, based merely on a semantic distinction.

23. Canada's efforts to explain its "options" only lead to further contradictions. Canada has argued that the producer of the input could become a downstream processor once export is prohibited. *See, e.g., Canada's Responses to the Panel's January 19 Questions*, page 5 (Question #6). If this occurs, government regulation has created additional production of the downstream product in the country imposing the export restraint (which was uneconomic absent

the restraint) at the expense of the industry in third countries, exactly the type of government subsidy that should be actionable according to Canadian documents prepared outside of this litigation. *See U.S. Answers*, para. 44, *quoting* CDA-106.

24. Now, Canada argues that the input producer could choose to go out of business by selling to someone else. At most, this option is a chimera. After all, what does the new purchaser do? It faces the same export restraint that eliminates the economically viable option of exporting, thereby forcing increased domestic sales or production of the downstream product that would not have occurred but for the export restraint. Or would Canada argue that the new purchaser has options because it, in turn, can sell the business to someone else? And that new purchaser, in turn, can sell to someone else, *ad infinitum*?

25. Throughout this dispute, the United States has set forth several reasons, in addition to the explanation above, as to why Canada's interpretation of "entrusts or directs" is incorrect. Given Canada's misdirection, a brief summary at this juncture seems necessary.

26. First, the United States has cited multiple texts that make clear that "entrusts or directs" includes circumstances in which one party (the government) engages in action which causes or results in the private body's action. *First U.S. Submission*, paras. 30-31, citing to *The New Shorter Oxford English Dictionary* (1993) ("cause to move in or take a specified direction;" "turn towards a specified destination or target"); *Black's Law Dictionary*, 7th ed. (1999) ("to cause (something or someone) to move on a particular course;" "to guide (something or someone);" " to govern;" "to instruct (someone or something) with authority"; and *The Oxford English Dictionary* (2nd ed.) ("to regulate the course of").

27. Canada now provides another text which it claims supports its "mandate" interpretation of "entrusts or directs." *Canada's Second Oral Statement*, para. 34 (citing *The Concise Oxford Dictionary of Current English*, 9th ed.). Canada quotes that source very selectively, because that source actually provides that "direct" means: "control, guide; govern the movements of"; "give a formal order or command to"; "tell or show . . . the way to a destination"; "point, aim, or cause . . . to move in a certain direction"; "guide as an adviser, as a principle, etc."; "supervise the performing, staging, etc. of ... ."; "guide the performance of". *See* CDA-136.

28. Even if one accepts Canada's argument that "directs" can only mean "give a formal order or command to", an export restraint is capable of satisfying that definition. An export restraint can be considered a "formal order or command to" not export. While Canada takes issue with whether or not an instruction to not export equates to an instruction to provide goods, *i.e.*, the function enumerated in subparagraph (iii), it should be noted that according to subparagraph (iv) the issue is whether the government direction is *of the type* of function illustrated in subparagraphs (i)-(iii). Furthermore, based on its arguments in this case, the United States understands Canada to concede that, whether or not considered to be an export restraint, a "formal order or command" to use or sell a good domestically satisfies the standard of subparagraph (iv).

29. Second, the negotiating history strongly supports the U.S. interpretation. Canada (and the EC) had argued throughout the Uruguay Round for a narrow definition of subsidy that would

only include subsidies which involved a cost to government. Canada made it clear that it believed that export restraints and other indirect subsidies would not be countervailable because they did not involve a "cost to government." *First U.S. Submission*, note 81 (citing *Communication from Canada*, MTN.GNG/NG10/W/25 (28 June 1989)). Only since having lost that misguided argument in *Canada Aircraft* has Canada shifted its focus to the "entrusts or directs" language.

30. Third, other cases – particularly *Canada Dairy* – and an analysis of the Illustrative List of Export Subsidies support the U.S. position. *First U.S. Submission*, paras. 61-66.

31. Finally, the object and purpose of the SCM Agreement clearly support the U.S. view. Indeed, export restraints are widely understood as providing a subsidy. *First U.S. Submission*, paras. 10-12. Frankly, the United States is puzzled by the extensive Canadian argument, *Canada's Second Oral Statement*, paras. 10-12, that the U.S. reliance on the normal understanding of the term subsidy as used by WTO, UN, and Canadian officials and economists somehow weakens the U.S. case.

9. How does the United States reconcile its argument that, so long as the *effect* of an export restraint is to increase the domestic supply of the restrained good, that export restraint constitutes a financial contribution in the form of a government-entrusted or -directed provision of goods within the meaning of paragraph (iv), with the "normally vested" and "in no real sense differs" language in that provision? In particular, could these conditions be seen as connoting, at a minimum (and whatever else they might mean), a *direct* and *explicit affirmative* control by the government of the particular action of the private body involved? If so, how could this be reflected in the effects-based approach that you advocate? If not, why not?

32. In addition to an examination of the causal relationship between the government action (*i.e.*, the export restraint) and the private action (*i.e.*, the domestic provision of a good), the other elements of subparagraph (iv) would still have to be satisfied – including the "normally vested in" and "in no real sense differs" elements – in order for a financial contribution to exist. However, "normally vested in" and "in no real sense differs" refer to the type of function carried out, and the manner in which it is carried out by the private body, not to the causal relationship between the government action and the behavior of the private body.

33. The United States continues to be of the view that the language in question was taken from the *Article XVI:5 Report*, which referred to the government functions of taxation and subsidization. That is, in order to satisfy the requirements of subparagraph (iv), the type of function which a private body is entrusted or directed to perform must be the type of action that a government would engage in when it subsidizes; *i.e.*, behavior that reallocates resources.[7]

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[7] As the United States has previously noted, *see First U.S. Submission*, para. 36, note 32, the Appellate Body has stated that "a 'subsidy' involves a transfer of economic resources from the grantor to the recipient for less than full consideration." *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, Report of the Appellate Body adopted 27 October 1999, para. 87.

34. In the view of the United States, there could well be situations in which the "entrusts or directs" element is satisfied, but other elements are not. One such example was provided in paragraph 75 of the *Second U.S. Oral Statement*.

35. Finally, the United States reiterates that nowhere in subparagraph (iv) is there any indication that "direct and explicit affirmative control" is required under either the "entrusts or directs" or the "normally vested in/no real sense differs" elements. Those terms were not used in the text, nor would their use make any sense. If "direct and affirmative control" by the government were the standard, then subparagraph (iv) could easily be evaded, and, as a result, would be rendered meaningless.

10. The United States indicates, in response to question 12(b) from the Panel:

> **"There is a difference between benefit and financial contribution for purposes of subparagraph (iv). Financial contribution would appear to be a matter of: (1) a proximate causal relationship between the government action and the private action; and (2) the private action being a form of taxation or subsidisation (*i. e.*, the type of action that a government 'normally' would do)."**

In the view of the United States, how can it be determined in practical terms, and without considering the question of benefit, that a given government "entrustment" or "direction" in the sense of subparagraph (iv) does or does not constitute a "form of taxation or subsidisation"?

36. Given that a subsidy involves a reallocation of resources, it could be determined, without getting into the question of benefit, whether a private body is being directed to provide resources (*e.g.*, a good) to another party in a transfer that would not otherwise occur. For example, in the context of an export restraint, the question would be whether private actors are directed to provide goods domestically when, in the absence of government direction, they would not otherwise do so. It would be a separate question whether this government-directed provision of goods actually resulted in the conferral of a benefit. In theory, the government direction could result in no changes in the prices that would obtain absent the government direction, in which case a benefit likely would not exist.

11. The United States further submits, also in response to question 12(b) from the Panel:

> **"While evidence for this second aspect [the private action being a form of taxation or subsidisation] and 'benefit' may overlap, *they are not the same thing*." (emphasis added)**

Canada previously has agreed that subparagraph (iv) addresses the government functions of taxation and subsidization. *See First U.S. Submission*, para. 52, note 51, *quoting Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, Report of the Panel, as modified by the Appellate Body, adopted 27 October 1999, para. 4.342.

Please explain in concrete terms the nature of the evidence to which you refer, and how such evidence could "overlap" in respect of financial contribution and benefit, without "being the same thing". Does the United States mean by this that the evidence would not be the same thing in the two contexts, or that the two contexts are not the same thing?

37. The evidence for private action being functionally the same type of activity performed by a government when it engages in taxation or subsidization and the evidence of "benefit" overlap because they both arise out of the same transaction and may or may not demonstrate that the private action would not have occurred but for the government intervention. The evidence of financial contribution goes to the existence of a transaction that meets the requirements of subparagraph (iv), while the evidence of benefit goes to whether the circumstances of that transaction meet the requirements of Article 14 of the SCM Agreement.

38. For example, in the case of a government loan, one must look to the loan transaction itself to determine whether a financial contribution took place, and then look to the terms of that same transaction in order to determine the existence of a benefit. The same would be true in the case of a government-directed loan, although there would be an additional evidentiary question of whether the government, in fact, directed the loan.

12. Would functions "normally [] vested" in a government in the sense of subparagraph (iv) be limited to "taxation and subsidisation"? Would other government functions involving the execution of various government policies (e.g., social policies) necessarily consist of "taxation or subsidisation"? If not, would such functions, even if they corresponded to functions described in subparagraphs (i)-(iii), fall outside of the scope of subparagraph (iv)?

39. As indicated in the *Second U.S. Oral Statement*, paras. 73-78, there are several possible interpretations that one could ascribe to the "normally vested" language, and the United States provided at least one example of a situation which probably would fall outside the scope of subparagraph (iv) even though the function arguably falls under subparagraphs (i)-(iii). The "normally vested in" language is an independent required element of subparagraph (iv), even if the function in question corresponds to subparagraphs (i)-(iii).

Questions to Canada

40. The United States wishes to comment on the following questions posed to Canada.

13. Have there been any cases where the Preamble has been used as a "legislative rule" in the sense described by the United States at paragraphs 30-43 of its second oral statement? If so, please provide details.

41. Canada's position appears to be that the DOC treats the portion of the Preamble at issue here as if it were a regulation, in disregard of various principles of U.S. administrative law relating to legislative rules and the non-binding nature of administrative precedent. In the view of the United States, this assertion is not supported by the relevant portion of the Preamble itself or the manner in which it has subsequently been cited by the DOC. However, when the entire Preamble is examined – as opposed to the portions challenged by Canada – it becomes even more apparent that the DOC was well-aware of what it needed to do in order to bind itself, and that when it chose not to do so, it did so deliberately.

42. For example, at page 65,349 of the DOC's *Notice of Final Rule*, CDA-3, the DOC provided the following explanation of why it chose not to bind itself with respect to so-called "hybrid instruments":

> In this regard, the Department considered codifying its approach with respect to so-called "hybrid instruments," financial contributions that do not readily fall into the basic categories of grant, loan, or equity. In the 1993 steel determinations (*see Certain Steel products from Austria (General Issues Appendix)*, 58 FR 37062, 37254 (July 9, 1993) ("GIA"), the Department developed a hierarchical approach for categorizing hybrid instruments, an approach that was sustained in *Geneva Steel v. United States*, 914 F. Supp. 563 (CIT 1996). However, notwithstanding this judicial imprimatur, the Department has relatively little experience with hybrid instruments. Therefore, although the Department has no present intention of deviating from the approach set forth in the GIA, the codification of this approach in the form of a regulation would be premature at this time.

43. At page 65,355 of CDA-3, the DOC provided the following explanation as to why it chose not to bind itself with respect to its so-called "privatization methodology":

> While we have developed some expertise on the issue of changes in ownership over the past five years, and the comments submitted in response to the 1997 Proposed Regulations have provided us with additional ideas to consider, we do not think it is appropriate to promulgate a regulation on this issue at this time. As noted above, many of the ideas presented by the commenters would move us in the direction of adopting extreme positions. Another factor weighing against codification of any privatization methodology at this time is that the Courts may, in the course of their review of the current methodology, adopt an interpretation of the law that would either validate or overturn some of the options that we have

> considered, including those proposed by the commenters. Finally, given the rapidly changing economic conditions around the world, particularly with respect to the issue of state ownership, we believe we should continue to develop our policy in this area through the resolution of individual cases. These changing economic conditions pose additional challenges in developing a unified framework in which to analyze change-in-ownership transactions. In the 1997 Proposed Regulations, we identified many of these additional issues and new challenges that may warrant consideration in this context and raised questions about them. However, it is our view that the comments we received did not sufficiently address many of these concerns.
>
> . . . .
>
> Our decision not to include a provision on changes in ownership to these Final Regulations does not preclude us from issuing such a regulation at a later date. We will continue to examine this issue and consider whether an alternative analytical framework can be developed that addresses the variety of change-in-ownership scenarios we have encountered and that, like the present methodology, satisfies Congressional intent that we examine changes in ownership on a case-by-case basis. In the interim, we will continue to apply our current methodology for ongoing CVD cases and carefully examine the facts of each case. However, we will consider whether modifications to the methodology may be appropriate.

44. Elsewhere in the Preamble, the DOC explained why it was not promulgating regulations with detailed criteria involving the concept of "general infrastructure" (CDA-3, page 65,378); regulations regarding the government purchase of goods (CDA-3, page 65,379); regulations codifying the DOC's then-existing practice regarding worker-related subsidies (CDA-3, page 65,380); and regulations on import substitution subsidies (CDA-3, page 65,385).

45. With respect to each of these topics, the discussion in the Preamble reveals that the DOC did not consider that it had sufficient experience to warrant the promulgation of a binding regulation, and that it preferred instead to retain its flexibility to develop its policy regarding these topics on a case-by-case basis. In light of these examples, it is simply implausible to argue, as Canada does, that the DOC considers itself bound by the portion of the Preamble challenged by Canada.

46. Canada's counter-argument is that if these types of preambular statements are not binding, then they are "meaningless." *Canada's Response*, para. 28. The United States cannot speak to the situation under Canadian law, but in the United States it is considered highly desirable for an administrative agency, operating within the framework of a democratic system of government, to keep the public informed of the agency's thinking via non-binding instruments such as general policy statements or interpretative rules. Thus, the portions from the Preamble quoted above were not "meaningless" statements, because they communicated to the public the DOC's thinking on the topics to which they related.

47. More generally, it is worth mentioning the trade-offs an agency faces when trying to

decide between the use of a legislative rule or some non-binding instrument, such as an interpretative rule or a general policy statement. From the agency's perspective, a legislative rule offers significant advantages in terms of efficiency. If a legislative rule is validly promulgated, the legislative rule is law, and the agency need not thereafter repeatedly justify the rule. In the case of an interpretative rule, on the other hand, the agency must continually justify the rule on a case-by-case basis. *See Second U.S. Oral Statement*, para. 56. In addition, a recent decision by the U.S. Supreme Court suggests that a legislative rule may receive a greater degree of judicial deference than an interpretative rule. *See* US-33, page 171, discussing the decision in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000).

48. The downside of a legislative rule is that because it *is* binding on the agency, the agency must live with the consequences of the policy choices reflected in the rule. For example, if, in a CVD proceeding, the DOC considered that the application of a regulation to the facts of the case generated the wrong result, the DOC would have to live with those results pending the repeal or amendment of the regulation. On the other hand, in the case of an interpretative rule, if an agency decided that the rule generated the wrong result, the agency could freely overrule the rule. *See Second U.S. Oral Statement*, para. 53, quoting US-34.

49. The Preamble, when considered *in toto*, indicates that the DOC considered these types of trade-offs. With respect to those topics for which the DOC felt that it had sufficient experience, it promulgated regulations, thereby binding itself. With respect to those topics for which the DOC felt it had insufficient experience – such as the new standards applicable to "indirect subsidies" under section 771(5)(B)(iii) of the Tariff Act – the DOC declined to promulgate regulations, thereby preserving its flexibility and discretion.

14. Canada argues, in response to question 16(c) from the Panel, that "[p]ractice is [] not an individual determination in a countervailing duty case (although a determination normally will reflect 'practice'), but rather is an institutional commitment to follow declared interpretations and methodologies that is reflected in cumulative determinations". In Canada's view, how is the "institutional commitment" expressed? That is, for something to be identifiable as such a "commitment", would it need to be reflected in writing, *e.g.*, in a DOC determination, and identified in general terms as agency "practice" or "policy"? If not, how (that is, in what form) would such an expression be made? To the extent that there is an explicit identification of a "practice" in a DOC determination or other document, how, in Canada's view, is this different from "legislation"?

50. For its part, the United States remains confused as to the precise nature of Canada's "institutional commitment" and how it fits within the legal framework in which the DOC operates. Putting aside the question of how this alleged "institutional commitment" is expressed, the key question is whether this "commitment" – whatever it may be – binds the DOC so as to require it to treat export restraints as financial contributions. In the view of the United States, there are only two such instruments that would be mandatory in this sense: a statute or a regulation. Canada has not disputed the fact that there is no DOC regulation regarding indirect subsidies in general, or export restraints in particular, and Canada has conceded that the statute does not mandate the DOC to treat export restraints as subsidies. Moreover, this conclusion

regarding the statute does not change upon consideration of the SAA.

16. Assume hypothetically that the Panel were to rule on, and find in favour of Canada's claims in respect of, all of the "measures" identified by Canada other than "practice". In Canada's view, what actions would the United States need to take in order to "bring its measures into conformity" pursuant to such a ruling? How would such actions differ from those that the United States would have to take if the Panel ruled in favour of Canada's claim in respect of "practice" as well? That is, what does Canada believe that the specific, practical implications would be for remedy of including or excluding "practice" from any hypothetical ruling by the Panel in favour of Canada's claims? In your response, please comment on the statement of the panel in *European Communities – Parts and Components*, after the finding that the legislative provisions in question were not mandatory, that while it would be desirable for the European Communities to withdraw the legislative provisions in question, the European Communities would meet its GATT obligations if it were to cease to apply those provisions in respect of Contracting Parties[8]. Would the same be true in this case, assuming the hypothetical ruling posited above? If not, why not? In your oral response to this question, you indicated that, assuming the hypothetical ruling, it would not be necessary for the United States to revise the SAA. How does this statement relate to your previous assertion that the SAA mandates the DOC to treat export restraints as financial contributions?

51. The United States submits that Canada's oral answer to this question wholly undermines the credibility of Canada's claims. Based on the U.S. delegation's notes, Canada made the following significant statements:

(a) With respect to the statute, no amendment to the statute would be necessary because the statute is not, on its face, inconsistent with the SCM Agreement;

(b) With respect to the SAA, the United States could "exploit" the proviso in the SAA so as to adjust its interpretation of the statute; and

(c) With respect to the Preamble, the DOC either could (i) publish a notice in the *Federal Register* disavowing the portion of the Preamble at issue in this dispute; or (ii) by means of a determination in a particular case cease to treat export restraints as subsidies (*e.g.*, decline to initiate on an alleged export restraint in an actual case, or issue a negative determination in an actual case on the grounds that export restraints do not constitute subsidies).

52. These statements are fundamentally at odds with the position Canada has taken throughout this dispute. With respect to the SAA, Canada has insisted that the SAA requires the DOC to interpret the statute in such a way as to treat export restraints as subsidies (or financial contributions). More specifically, as the Panel well knows, Canada has argued throughout this

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[8] *European Economic Community – Regulation on Imports of Parts and Components*, Report of the Panel, BISD 37S/132, adopted 16 May 1990, para. 5.26.

dispute that the proviso in the SAA is meaningless. Indeed, in *Canada's Second Oral Statement*, paras. 15-17, Canada continued to insist that the SAA requires the DOC to treat export restraints as subsidies (or financial contributions). Yet, only a few hours later, Canada, in responding to this question, admitted that the SAA does not really require any such thing.

53. The fact that Canada has taken inconsistent positions in the course of this dispute is not surprising. As demonstrated by US-32, as recently as September 1999 in the *Live Cattle* case, Canada was of the view that the SAA did *not* require the DOC to treat export restraints as subsidies.

54. Turning to the Preamble, Canada has insisted throughout this case that the Preamble has the same status as a regulation; *i.e.*, that it is a legislative rule that is binding on the DOC. However, if that were the case, then the DOC could not simply disavow the Preamble by publishing a *Federal Register* notice or applying a new approach in an actual CVD case. As a legislative rule, the Preamble would be "law"; *i.e.*, it would be binding on the DOC until properly repealed or amended. The only proper way to repeal or amend a legislative rule is to engage in the same notice-and-comment rulemaking by which the legislative rule was promulgated in the first place. Thus, Canada's suggested methods of implementation are totally at odds with its characterization of the legal status of the Preamble.

17. We understand Canada to make the following two arguments concerning the legislation at issue: (i) that the statute "as interpreted by" the SAA and the Preamble is *mandatory legislation that requires* the DOC to violate its obligations under the SCM Agreement; and (ii) that, although the statute on its own is discretionary, in the sense that it would be possible to interpret it in a WTO-consistent manner, the SAA and the Preamble "curtail the discretion" of the DOC to act WTO-consistently. Is this a correct understanding of Canada's arguments? Are these two formulations simply two different ways of saying the same thing, or is the second formulation an alternative argument to the first, or a different argument in some other respect from the first? Please explain.

55. The United States notes that "curtailing discretion" is not the same as "mandatory legislation." Any authority – a law review article, a congressional committee report, a prior administrative precedent, a determination by authorities of another Member – can be said to "curtail discretion" in the sense that, to the extent the authority is persuasive, it makes one approach more likely than the alternative and, for a rational, defensible decision, a decision-maker may choose to follow, explain, or distinguish the authority. However, this is not the same thing as mandatory legislation.

56. Consider, for example, the treatment of the Canada Account in *Canada Aircraft*.[9] The existence of the Canada Account made the provision of prohibited export subsidies more likely than would have been the case if the Canada Account had not existed. Nonetheless, the panel in that case found that the Canada Account, as such, was not WTO-inconsistent because it did not

[9] *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, Report of the Panel, as modified by the Appellate Body, adopted 20 August 1999, paras. 9.124, 9.128-9.129.

mandate the provision of export subsidies. The panel so ruled notwithstanding the fact that it simultaneously found that particular debt financing made under the Canada Account did constitute the provision of prohibited export subsidies.

19. Could Canada explain the apparent inconsistency between its characterisation of the proviso in the SAA in this dispute and its arguments concerning the same proviso in the *Live Cattle* investigation, referred to at paragraph 24 of the second oral statement of the United States.

57. In the view of the United States, the inconsistency and Canada's attempted rationalization speak for themselves.

58. The United States notes that when Canada made the argument in *Live Cattle*, it presumably was convinced, and argued on the record, that the DOC was not required by the statute, the SAA, or any other "measure" to treat export restraints as subsidies (or financial contributions).

20. What is the significance of the following sentence of the paragraph from the Senate Joint Report on the URAA (Exhibit CAN-134), an excerpt of which you quote at paragraph 19 of Canada's second oral statement?:

> **"The Committee further expects that these types of indirect subsidies will continue to be countervailable where the standard under new section 771(5)(B)(iii) has been met."**

Does this sentence in Canada's view have the same meaning as the proviso in the SAA?

59. Setting aside the obvious implication to be drawn from Canada's selective quotation of the Senate Joint Report in its *Second Oral Statement*, in the view of the United States, this sentence has the same meaning as the proviso in the SAA; namely, that "indirect subsidies" of the type countervailed in the past will continue to be countervailable only if the DOC determines that the standard of subparagraph (iv) has been met.

60. Canada purports to have identified all the "measures" that make up the "treatment of export restraints under U.S. countervailing duty law, but until the last minute ignored the Senate Joint Report. This is yet another reason why panel rulings should be based on actual actions of Members or clear mandatory legislation, rather than speculation about how an administrative agency might rule in the face of a plethora of authority and possible fact patterns.

23. Canada appears to argue, in its responses to questions 11 and 12(a) from the Panel, that the coverage of paragraphs (i)-(iii) of Article 1.1(a)(1) is broader than that of paragraph (iv). That is, Canada argues that any action by a government itself of the type described in paragraphs (i)-(iii) would, by definition, and without any additional conditions, be a "financial contribution". Canada also argues, however, that if a government undertook the same action but this time operated *through* a private body, this action would only be a "financial contribution" if that government "ordinarily" performed

that function. The implication of this argument would appear to be that government intervention in the market through a private body (even if repeated over some period of time) would not satisfy the requirements of paragraph (iv), unless the government already had a past history (or prior "ordinary" practice) of doing so itself directly. For example, if a government had no past history of lending money to private companies itself out of its own funds, and then began to order private banks to make certain loans to certain companies, Canada's argument seems to imply that these loans, in spite of being made at the explicit direction of the government, would not constitute financial contributions by that government, *because of* the absence of a prior practice of direct government lending. Is this a correct understanding of Canada's argument? Please explain, and please discuss the rationale or purpose under Article 1 for what Canada sees as two different legal standards under different paragraphs of the same "financial contribution" provision, *i.e.*, one standard under paragraphs (i)-(iii), and a second, narrower standard under paragraph (iv)?

61. For reasons previously expressed, the United States considers Canada's argument (which the Panel accurately reflects) to be without logical foundation. At the close of the second meeting with the Panel, even Canada appeared to acknowledge the perverse results which its interpretation would generate.

62. At this point, the United States simply would add that Canada's interpretation is inconsistent with the object and purpose of the WTO Agreement, which, as expressed in the preamble thereto, includes "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade ... ." Under Canada's interpretation, activity by Member A might constitute a financial contribution within the meaning of subparagraph (iv), while the same activity by Member B might not. Such an outcome is not only nonsensical, but hardly can be considered "reciprocal and mutually advantageous."

24. Could Canada please respond to the US argument in the last sentence of paragraph 46 of its second oral statement.

63. Please see the U.S. answer to question 13, above.